IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

KOCH FOODS OF MISSISSIPPI, LLC

VS. Case No. _____

UNITED STATES OF AMERICA

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS AND FOR RETURN OF PROPERTY

The Fourth Amendment protects business establishments from searches and seizures by the United States government.[1] A search and seizure unsupported by probable cause is unlawful. *See* Fed. R. Crim. P. 41(d)(1) ("After receiving an affidavit or other information, a magistrate judge…must issue the warrant if there is probable cause to search…."). A search and seizure is justified, and a warrant may be issued if evidence is presented to the United States Magistrate Judge demonstrating that there is probable cause that evidence of a crime is in the possession of the targeted business to be searched. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 238 (1983) (there is probable cause to search if there is "a fair probability that contraband or evidence of a crime will be found in a particular place").

The affidavit supporting the search warrant executed at Koch Foods' Processing Plant in Morton, Mississippi on August 7, 2019, does not contain any evidence that Koch Foods knowingly employed persons lacking sufficient work authorization. *See* Search Warrant, attached to Motion as Exhibit A. The United States is not allowed to execute these work place search warrants on suspicion. *See e.g., Nathanson v. United States*, 290 U.S. 41, 47 (1933) (the

[1] "Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment." *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986). *See also, Marshall v. Barlow's Inc.*, 98 S. Ct. 1816, 1819 (1978) ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes").

magistrate could not make an independent assessment of probable cause because the officer merely stated that his suspicion of criminal activity was supported by cause without disclosing the supporting facts).

Search warrants must be founded on the existence of probable cause to believe that the targeted business is in possession of evidence that the business has perpetrated a crime. The search warrant affidavit supporting the government's raid of Koch Foods' Morton Processing Plant contains no such evidence. Accordingly, the government should not be allowed to use the information--the documents and electronic data-- seized during the illegal search of August 7th, and the company's property should be returned to Koch Foods as required by Rule 41 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 41(g) ("A person aggrieved by the unlawful search and seizure of property or by the deprivation of property may move for the property's return").

The search warrant executed at Koch Foods' Morton Processing Plant was not obtained in good faith.

This Court's standard for reviewing the issuance of the Koch Foods search warrant is set forth in *United States v. Ramirez:*

> Where the challenged search was conducted pursuant to a warrant, we must determine "(1) whether the good-faith exception to the exclusionary rule applies; and (2) whether probable cause supported the warrant." 247 Fed. Appx. 515, 517 (5th Cir. 2007) (quoting *United States v. Marmolejo,* 86 F.3d 404, 417 (5th Cir. 1996)). If the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984), applies, then "we need not reach the question of probable cause for the warrant unless it presents a 'novel question of law,' resolution of which is 'necessary to guide future action by law enforcement officers and magistrates.'" *United States v. Payne,* 341 F.3d 393, 399 (5th Cir.2003).

United States v. Ramirez, 247 Fed. Appx. 515, 517 (5th Cir. 2007). *See also, United States v. Allen,* 625, F.3d 830, 835 (5th Cir. 2010).

The good faith exception to the exclusionary rule is evaluated based on objective, not subjective criteria:

> In considering whether the good-faith exception applies, we do not attempt an "expedition into the minds of police officers" to determine their subjective belief regarding the validity of the warrant. *Id*. (quoting *Leon*, 468 U.S. at 922 n. 23). "Rather, our inquiry is 'confined to the objectively ascertainable question *whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization*." *Id*. (quoting *Leon*, 468 U.S. at 922 n. 23). "Whether the exception applies will ordinarily depend on an examination of the affidavit by the reviewing court, but all of the circumstances surrounding issuance of the warrant may be considered." *Id*.

Ramirez, 247 Fed. Appx. at 517 (emphasis added) (citations omitted). *See also, United States v. Massi*, 761 F.3d 512, 525 (5th Cir. 2014)("The good faith exception to the exclusionary rule provides that 'evidence obtained during the execution of a warrant later determined to be deficient is nonetheless admissible if the executing officer's reliance on the warrant was *objectively reasonable* and made in good faith.'")(emphasis added)(citing *United States v. Woerner*, 709 F.3d 527, 533 (5th Cir. 2013)).

The affidavit sworn out against Koch Foods contains no information from confidential informants alleging that Koch Foods was knowingly hiring unauthorized workers. And the affidavit does not indicate that ICE has any source indicating that this type of illegal behavior exists at the Morton Processing Facility. The affidavit is entirely founded on the presumption that, since certain persons who have been deported by United States Immigration and Customs Enforcement (ICE) had previously worked at Koch Foods' Morton Processing Plant, *then it should be assumed* that Koch Foods must have known that they were hiring unauthorized workers. The affidavit goes no further than this to attempt to establish probable cause. The affidavit's statistics and specific examples of deportees having a Koch Foods employment history

are both statistically insignificant and anecdotal and, as a result, no "reasonably well trained officer" would have believed that a search based on this strained logic would be legal.

Moreover, the affidavit relies on the baseless and discriminatory assumption that Koch Foods' continued employment of Hispanic workers who wore ankle monitors establishes proof that Koch Foods knew these workers were under order of deportation. This is the affiant's premise even though ankle monitors are universally used by various local, state, and federal criminal justice agencies. Any number of courts from various jurisdictions can require persons who have been arrested, incarcerated or detained to wear an electronic monitoring device, such as an ankle monitor, as a condition of release from incarceration. In any event, the wearing of an ankle monitor is not a matter of concern to be addressed by Koch Foods work supervisors. These individuals are most often allowed to go to work as a condition of their release. The affiant's presupposition that an ankle bracelet is a scarlet letter of a lack of authorization to work in the United States is baseless and no "reasonably well trained officer" would have believed that a search based on this line of reasoning would be legal.

The search warrant affidavit alleges, with no supporting evidence, that Koch Foods knowingly hired unauthorized aliens.

The search warrant was executed on suspicion that Koch Foods knowingly hired individuals for employment, "with actual knowledge that the individuals are unauthorized aliens" in violation of 8 U.S.C. § 1324(a)(3)(A). *See* Affidavit of Special Agent Anthony Todd Williams, Jr. (hereinafter *Williams Affidavit*), attached to Motion as Exhibit B. This investigation is being carried out with the express purpose of ICE to find evidence and prosecute the "[i]ntentional hiring of unauthorized aliens…in violation of Title 8, United States Code, Section 1324(a)(3)(A)." *Williams Affidavit* ¶ 7. The investigation and thereby the search was conducted with the purpose of gathering evidence that either the entity, Koch Foods, or

individuals working at Koch Foods knowingly engaged in illegal hiring of this type. *See, Williams Affidavit* ¶ 7.

According to the affidavit submitted by ICE, "there is probable cause to believe that violations of Title 8 and Title 18 of the United States Code have been committed by Koch Foods of Mississippi, LLC and others." *Williams Affidavit* ¶ 11. But this is indicia of a "bare bones" affidavit which the Fifth Circuit declares to be insufficient to establish good faith on behalf of the agent.

> One of the circumstances where an officer's reliance on a warrant is not objectively reasonable is where the affidavit used to secure the warrant is "bare bones," i.e., "the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."…"Bare bones" affidavits typically "contain *wholly conclusory statements*, which lack the facts and circumstances from which a magistrate can independently determine probable cause." Generally, examples of "bare bones" affidavits include those that merely state that the affiant "has cause to suspect and does believe" or "has received reliable information from a credible person and does believe" that contraband is located on the premises.

Ramirez, 247 Fed. Appx. at 517-18 (emphasis added) (citations omitted). This is a perfect description of the Williams Affidavit, as detailed in the discussion below.

The affidavit refers to no credible evidence resulting from the "Tip Line leads" it references.

According to ¶ 13 of the Affidavit, "Homeland Security Investigations (HSI) Jackson, Mississippi, is investigating Koch Foods, for illegally employing subjects without work authorization in the United States." The affiant claims that, "HSI Jackson has recently received numerous HSI Tip Line leads suggesting Koch Foods (a chicken processing company with a large industrial footprint in the state of Mississippi), is knowingly hiring and employing illegal aliens and/or subjects without employment authorization from the Department of Homeland Security." *Williams Affidavit* ¶ 13 (emphasis added). However, this conclusory statement is the affidavit's only reference to these "leads." This is indicia of a bare bones affidavit. The affidavit

is absent of any claim that these leads have produced credible evidence that Koch Foods is "knowingly hiring and employing illegal aliens and/or subjects without employment authorization from the Department of Homeland Security."

The use of anonymous tips to establish probable cause must be given particular scrutiny. *Illinois v. Gates*, 462 U.S. 213, 242 (1983). Otherwise, virtually no limit to the government's ability to execute search warrants would exist. An anonymous tip must bear some "indicia of reliability" before law enforcement may rely on the tipster's allegation as probable cause. *Florida v. J.L.*, 529 U.S. 266, 270-71 (2000).[2] Corroboration is necessary, and the Williams Affidavit provides no claim that ICE or HSI tested the bases of these tips, the veracity of the tipster, or made any other effort to corroborate the HSI Tip Line leads. *See Gates*, 462 U.S. at 245. Most significantly, the affidavit does not indicate that any tip led to useful information of any type. The affidavit only says there were tips.

The fact that a statistically insignificant number of unauthorized aliens worked at Koch Foods cannot provide probable cause that the company *knowingly* hired unauthorized workers.

Much of the Williams Affidavit is founded on this premise: That ICE has, over a 17-year period, arrested "illegal aliens" who, at one time, worked at Koch Foods. In particular, Special Agent Williams states that, "approximately 144 historical ICE encounters and/or arrests from September 10, 2002 to April 13, 2019 of illegal aliens who during processing indicated employment at Koch Foods in Morton and/or Forest, MS." *Williams Affidavit* ¶14. In other

[2] "An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" *Alabama v. White*, 496 U.S. 325, 329 (1990) (quoting *Gates*, 462 U.S. at 237).

words, over a 17-year period, an average of, at most,[3] eight Morton Processing Plant employees per year have ultimately been deported. Today, the Morton Processing Plant employs 1,170 individuals. *See* Affidavit of Robert H. Elrod, Vice President of Human Resources for Koch Foods, Inc. (hereinafter *Elrod Affidavit*), ¶2, attached to Motion as Exhibit C. Eight deportees, based on the statistical average being used to establish probable cause, constitute less than 1% of the work force at the plant where the search warrant was executed.

This is not evidence indicating that Koch Foods has been "knowingly hiring and employing illegal aliens and/or subjects without employment authorization from the Department of Homeland Security." Koch Foods, at its Morton Processing Plant has, from January 1, 2008 to the present, employed almost 9,500 different individuals. The 144 unauthorized workers referenced in the affidavit represent less than 2% of the individuals processed and hired by Koch Foods at the Morton Processing Plant, over that past 11 years. *Elrod Affidavit* ¶2.

The search warrant affidavit omits exculpatory information demonstrating the absence of probable cause that Koch Foods has knowingly hired unauthorized workers.

The affiant's conclusion, that there was probable cause to believe that Koch Foods' Morton offices possessed evidence that it was knowingly hiring unauthorized workers, is founded on the bare assertion that, over a 17 year period, 144 former employees from any of the eight Morton and Forest facilities were deported. The search warrant affidavit omits that, during that 17 year period, in 2008, Koch Foods found evidence indicating it may have hired unauthorized workers and the company, on its own initiative, voluntarily disclosed to the U.S. Attorney's office and ICE, the findings of its investigation and actions taken by Koch Foods to

[3] This average provides every benefit of the doubt to the claims of the Williams Affidavit because, in addition to the Morton Processing Plant, Koch Foods has seven other facilities in Morton and Forest employing hundreds more workers.

improve its hiring practices. Koch Foods then cooperated in an investigation conducted by the U.S. Attorney's Office for several months. *Elrod Affidavit* ¶ 5.

During the government's investigation in 2008, Koch Foods disclosed to the government the proffered identities of all employees at its Morton and Forest plants, their I-9's, copies of their back up documentation and proof that each employee had cleared E-Verify. Some of those employees remained employed at their Koch Foods jobs from 2008 until being detained during the ICE/HSI raid on August 7, 2019. *See Elrod Affidavit* ¶6. Apparently ICE reviewed this employee information in 2008 and, like Koch Foods, did not detect that some of these employees were using aliases. Two of these former Koch Foods employees were indicted only recently for using "forged, counterfeited, altered, and falsely made" identification documents. *Compare* Indictment of Mateo Martin-Santizo a/k/a Luis F. Rodriguez, Crim. No. 3:19cr195 HTW (Aug. 20, 2019); and Indictment of Pedro Silvestre-Perez a/k/a Daniel Escamilla, Jr., Crim. No. 3:19cr170DPJ (Aug. 20, 2019) *with Elrod Affidavit attachments.* If it took the government 11 years to determine this falsity, how can it be inferred, merely from the fact that these employees were ultimately found to have used falsified documentation, that Koch Foods was acting *knowingly* during the hiring process?

The affidavit describes instances where Koch Foods was victimized by identity theft but does not explain how this would provide probable cause of criminal activity at Koch Foods.

According to the Williams Affidavit, former employees of Koch Foods have been deported upon determination by the United States that these individuals were guilty of identity theft. *See Williams Affidavit* ¶¶ 15, 18. None of these examples include any evidence that Koch Foods knowingly hired and employed these individuals being aware that they lacked proper employment authorization. This part of the affidavit proves nothing more than that these

individuals lied to Koch Foods about their identity. Significantly, in none of these instances did ICE or HSI or the United States Attorney's office notify Koch Foods of their discovery.

The affidavit gives a few examples of former processing plant employees eventually being deported but provides no indication that Koch Foods had hired these individuals, knowing they were not authorized to be in the United States.

According to the Williams Affidavit, former employees of Koch Foods-Morton have been deported upon determination by the United States and these individuals, at the time of their arrests by ICE, lacked proper work authorization on their person. *See Williams Affidavit* ¶¶ 16, 17, 19, 20, 21. The affidavit claims that one former employee stated that, when he worked at Koch Foods in 2017, "the plant knew his immigration status…." Williams Affidavit ¶16. This is a vague allegation by someone who has already admitted that he lied to Koch Foods about his true identity and "immigration status." In any event, the information is about 18 months old and is not probable cause that there is evidence of a crime on the premises to be searched in August 2019.

Otherwise, none of these examples include any claims that Koch Foods knowingly hired and employed these individuals being aware that they lacked proper employment authorization. Some of these individuals admitted to ICE that they lied to Koch Foods about their identity. *See Williams Affidavit* ¶ 17. This part of the affidavit shows nothing more than that, when arrested, these individuals admitted that they had misrepresented their identities and immigration status to Koch Foods. Every employee who has been hired by Koch Foods since 2007 has completed an I-9 form, had their identification documentation examined, and passed E-Verify. *Elrod Affidavit* ¶ 3.

The affidavit suggests that Koch Foods was on notice that some of its employees were unauthorized to work because they were wearing ankle monitors.

Half of the affidavit describes ICE's Alternative to Detention (ATD) Program which allows ICE to monitor the movements of persons who have been taken into ICE custody and released. *See, Williams Affidavit* ¶¶ 22-44. The affiant states that, "Enrollment in the ATD program does not grant any immigration benefits including employment authorization." *Williams Affidavit* ¶ 24. However, the affidavit contains no claim by Williams that his agency made Koch Foods aware of this program.

Moreover, Koch Foods employs workers from time to time who wear electronic monitoring devices, in some cases ankle monitors, for various reasons. *Elrod Affidavit* ¶ 4. Many agencies and courts condition the release of persons who have been arrested, incarcerated, or detained on the releasee wearing an electronic monitoring device, such as an ankle monitor. *See* Affidavit of Emmitt L. Sparkman ¶¶10-12 (hereinafter *Sparkman Affidavit*), attached to Motion as Exhibit D. Koch Foods supervisors do not question employees about these monitors if they happen to become aware of them. In fact, supervisors cannot engage in discriminatory behavior by questioning Hispanic employees about ankle monitors while ignoring ankle monitors worn by white and African-American employees. *See* 42 U.S.C. § 2000e-2 (Unlawful Employment Practices).

These monitors likely are not even visible since employees wear long pants and often wear rubber boots because of the cold and wet working conditions on the plant floor. *See* Photographs published in the *Clarion Ledger* (August 8, 2019) (showing employees at the Koch Foods Morton Processing Plant being arrested by ICE/HIS) attached as to Motion as Exhibit E.

Indeed, the Williams Affidavit provides only one example of a supervisor being aware of an employee wearing an ankle monitor, but provides no evidence that the unidentified supervisor

knew the reason the employee was wearing the monitor. *Williams Affidavit* ¶42. Therefore, the fact that a Koch Foods employee had an ankle monitor proves nothing with regard to whether Koch Foods was on notice that, if one of its workers wore an ankle device, it knowingly hired individuals for employment, "with actual knowledge that the individuals are unauthorized aliens" in violation of 8 U.S.C. § 1324(a)(3)(A).

According to Williams, shortly before the search warrant was executed, 21 employees of Koch Foods' Processing Plant in Morton were participating in the ATD program. *Williams Affidavit* ¶ 25. The affidavit contains no evidence that the ankle monitors of themselves provided notice to Koch Foods that these individuals lacked work authorization from ICE, the reasons the devices were worn, or any information indicating any of its employees were not authorized to work. In fact, in none of the examples included in the Williams Affidavit of ICE having discovered that a Koch employee lacked proper work authorization did ICE notify Koch Foods of this discovery.

There is no allegation in the Williams Affidavit that Koch Foods was aware that Celsa Elena Bamaca-Gonzalez provided false information when she was hired.

Much of the affidavit describes the HSI's findings with regard to one Koch Foods employee, whose actual identity, unknown to Koch Foods, was Celsa Elena Bamaca-Gonzalez. *Williams Affidavit* ¶¶ 27-35. According to Williams, Bamaca-Gonzalez provided Koch Foods with a fraudulent identification card and social security number at the processing plant on Morris Tullos Drive. *Williams Affidavit* ¶ 31. There is no allegation in the affidavit that Koch Foods was aware that Bamaca-Gonzalez provided false information. According to the Affidavit, Bamaca-Gonzalez later received permission from the U.S. Department of Homeland Security (DHS) to work in the United States. *Williams Affidavit* ¶ 32. The affiant infers fault on behalf of Koch Foods for later accepting Bamaca-Gonzalez as a worker through the WIN Job Center to

work at its prepared plant on Koch Drive. This does not provide any evidence that Koch was knowingly hiring and employing unauthorized aliens and/or subjects without employment authorization. In fact, the Williams Affidavit makes it clear that Bamaca-Gonzalez was screened by two different HR personnel at two different plants. *Williams Affidavit* ¶¶ 31, 33. Probable cause requires much more than speculation about an employer's hiring practices. Otherwise, search warrants are authorized at every large food processing plant in the United States where employees have provided false identification information at the time of hire unbeknownst to the employer.

The Williams Affidavit contains no proof or even allegation that Koch Foods knew that it was being provided false identification documents by prospective workers.

Similarly, the affiant bases the government claim of probable cause on the case of Ana Santizo-Tapia, a Guatemalan enrolled in the ATD program who got a job at Koch Foods by using a false identity. *Williams Affidavit* ¶¶ 36-43. The affidavit shows the diligence of Koch Foods' Human Resources staff to insist to this job applicant that, if her papers were not sufficient, she would not be hired. *Williams Affidavit* ¶ 41. Herein the Williams Affidavit demonstrates the institutional practices of Koch Foods designed and used to avoid the hiring of persons lacking proper work authorization. Williams claims that Santizo-Tapia returned three weeks later, using the identity of another person in Texas, and she was hired by Koch Foods. *Williams Affidavit* ¶¶ 41-43.

The case of Ana Santizo-Tapia includes no information indicating Koch Foods' awareness that it was hiring an employee who had lied about her identity during the hiring process. In the fourth quarter of 2018 alone, Koch Foods received over 1,500 applications for employment at its Morton Processing Plant. *Elrod Affidavit* ¶ 2. It is unreasonable to assume that an HR employee would recognize one of hundreds of applicants in a three-week period as

being someone who had previously attempted to become unemployed under a different identity. Koch Foods has procedures in place to detect persons who attempt to be hired under multiple identities, and the case of Santizo-Tapia, at best from the government's perspective, merely shows imperfection in uncovering repeat offenders who take devious means to avoid detection. It does not, however, show criminal conduct or intent by Koch Foods.

This case presents a novel question of Fourth Amendment law.

If this Court determines that the Williams Affidavit meets the good faith exception to the exclusionary rule, both the motion to suppress and motion for return of property should be granted because this case presents "a novel question of Fourth Amendment law"[4]: Can ICE or HSI establish probable cause for a search warrant for a large employer who employs immigrants by swearing out an affidavit that states that the employer has, either anecdotally or in a frequency that is statistically low, hired immigrants who later prove to have lacked work authorization? If the Williams Affidavit is sustained by this Court to establish probable cause, then any large employer in the United States, which hires immigrants and is later shown to have hired some immigrants who were deported, will be exposed to having its rights violated and being publicly slandered by the execution of a search warrant by ICE or HSI. This would be a dangerous precedent for our republic. Such a precedent or template for search warrant affidavits would subject employers to further significant harm from the already fundamentally flawed U.S. immigration legal framework by allowing an employer's lawful conduct—mere imperfect detection of employees' misrepresentations--to serve as the sole basis for executing a search warrant on the employer.

[4] *Ramerez*, 247 Fed. Appx. at 517.

The exclusionary rule should bar the government's use of the information illegally seized.

The exclusionary rule "operates by generally 'bar[ring] the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.' The purpose of the rule is to deter violations of the Fourth Amendment…." *United States v. Ganzer*, 922 F.3d 579, 584 (5th Cir. 2019) (quoting *Davis v. United States*, 564 U.S. 229, 231, 236-37 (2011)). "'When police exhibit deliberate, reckless, or grossly negligent disregard for the Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs.'" *Ganzer*, 922 F.3d at 586 (quoting *Davis*, 564 U.S. at 238).

Here, law enforcement has not presented an affidavit of evidence of Koch Foods' intentional hiring of unauthorized workers. Law enforcement has sworn out a substantively bare bones affidavit inferring probable cause from anecdotal examples and statistically insignificant data of Koch Foods employees who used false documentation and aliases to get hired. ICE represented to the magistrate judge that ICE's ankle monitors were notice of themselves to Koch Foods that a worker lacked authorization to work in this country. Corrections expert Emmitt Sparkman establishes the blatant untruth of such a claim.

This Court should hold that lawful American businesses should not be slandered by bare allegation affidavits drawing unreasonable inferences from the following unavoidable reality of doing business in this country: If you hire large numbers of entry level workers, you may follow the law, appropriately examine workers' documentation, properly complete their I-9s, and verify their information through E-Verify, and still some applicants may have lied about their true identity and authorization to work and be hired by you. Even the U.S. Attorney's Office and ICE reviewed the *same information* on some of these workers as did Koch Foods in 2008 and they failed to discover that the workers were using aliases and false documentation. Imperfection

ought not expose a business to the egregiously disruptive execution of a work place search warrant. The execution of the search warrant in this case was an abuse by law enforcement that should not be permitted. *See United States v. Ganzer,* 922 F.3d 579, 588 (5th Cir. 2019) (Bad faith on the part of law enforcement calls for application of the exclusionary rule, where "the affidavit [in support of the warrant] is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable…."(quoting *United States v. Leon,* 468 U.S. 897, 923 (1984)).

Return of Property under Rule 41(g)

If the Court chooses to evaluate this Motion under the standards for a Rule 41(g) Motion for Return of Property, the result is the same. After the 1989 Amendment to Rule 41(e), the predecessor of Rule 41(g), the rule only addresses the return of property and not suppression. However, regardless of whether Rule 41 is the mechanism for return of the property, the government still cannot use evidence unless the seizure was permissible under the Fourth Amendment. In any event, "[u]nder the new Rule, the court can impose conditions upon the return of property to protect access and use of the property in subsequent proceedings." 1 White Collar Crime § 3.51 *Procedures to Obtain Return of Records* (2019).

Above all, the protections of the Fourth Amendment are not suspended or displaced by the Rule: "The fourth amendment protects people from unreasonable seizures as well as unreasonable searches…and reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property." *Fed. R. Crim. P. 41 advisory committee note* (1989). The 1989 amendment to the rule deleted the language of inadmissibility in order to align the rule with *Leon:*

> The amendment deletes language dating from 1944 stating that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return

> property under Rule 41(e). This language has not kept pace with the development of exclusionary rule doctrine and is currently only confusing. The Supreme Court has now held that evidence seized in violation of the fourth amendment but in good faith pursuant to a warrant, may be used even against a person aggrieved by the constitutional violation. *United States v. Leon,* 468 U.S. 897 (1984).

Fed. R. Crim. P. 41 advisory committee note (1989).

Koch Foods has demonstrated to the Court in this brief that the search and seizure on August 7th violates the Fourth Amendment, and the fruits of that search should be excluded from any future criminal proceeding as the warrant allowing that search was not obtained in good faith and is not deserving of an exception to the exclusionary rule.

Even under a Rule 41(g) analysis, Koch Foods' property should be returned. There are four factors to be considered by the Court. *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975). First, the court should consider whether the government has displayed a callous disregard for the constitutional rights of the movant. This brief demonstrates this factor.

Second, the court should consider whether the movant has individual interest in and a need for the property whose return is sought. The search emptied the Morton Processing Plant of much of its paper records, and many of those records, like I-9 files and personnel files, are not replicated in the electronic data.

Third, the Court should consider whether the movant would be irreparably injured by denial of the return of property. The heart of the government's investigation is the I-9 files. These and other materials, such as personnel files, that are now in the exclusive hands of ICE/HSI need to be reviewed by Koch Foods so that the company can conduct its own internal investigation of the allegations in the search warrant affidavit. The company, as well as individuals employed by Koch Foods, may be irreparably harmed by being unable to review, analyze, and demonstrate to the government the reasons why an investigation in this case is unwarranted.

Finally, the court should consider "whether the movant has an adequate remedy at law for the redress of his grievance." The answer to this question is no. This seizure opened a criminal investigation on the basis of something far less than probable cause. As a result, Koch Foods is forced to operate in the aftermath of this seizure without the benefit of the possession of its records such as personnel files and I-9 files which are necessary for daily operations. The Court should exercise its equitable authority to suppress the use of this evidence or, at a minimum, provide for its return so that the company can fully resume operations of its Human Resources Department and prepare a defense.

Conclusion

The affidavit supporting the application for the search of the premises of Koch Foods' Processing Plant in Morton is based on (1) unsubstantiated leads to an HSI tip line with no evidence of reliability; (2) evidence that Koch Foods has hired, over the past 17 years, a statistically insignificant number (less than 1%) of undocumented workers who were found to have lied about their true identities and were deported; and (3) evidence that 21 Koch employees wore ankle monitors, which could have been placed on them by any number of law enforcement or judicial authorities, which then authorized them to go to work. The affidavit supporting the search warrant executed at Koch Foods' Processing Plant in Morton, Mississippi on August 7, 2019, does not contain any evidence that Koch Foods knowingly employed persons lacking sufficient work authorization. Therefore, probable cause was lacking, contrary to what was claimed in the Williams Affidavit, that "there is probable cause to believe that violations of Title 8 and Title 18 of the United States Code have been committed by Koch Foods of Mississippi, LLC and others." Accordingly, the property seized by ICE and HSI agents on August 7, 2019

should be suppressed from use by the government in any investigation targeted toward Koch Foods or any of its employees and the property should be returned.

This the 30th day of August, 2019.

Respectfully submitted,

KOCH FOODS OF MISSISSIPPI, LLC

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